Public Prosecutor v Noorhaidi bin Mohd Noor Rahim

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–15 OF 2006
NALLINI PATHMANATHAN JC
24 OCTOBER 2008

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Manner of proving trafficking — Whether sufficient to establish an act of trafficking coupled with weight of drugs — Whether weight of drugs could by itself established trafficking

Criminal Procedure — Defence — Court, duty of — Whether accused had raised reasonable doubt

Criminal Procedure — Prosecution — Prima facie case — Duty of court at end of prosecution's case — Whether court ought to undertake maximum evaluation of prosecution's evidence

The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 1,749gms of cannabis. For the prosecution, SP4, the police arresting officer, testified that acting on information received, he led a police team to a certain house. On arrival, they almost immediately raided the said house. The accused was caught in the hall holding a white plastic bag ('P9'), which he immediately threw down on seeing the police team. From inside the said bag, SP4 recovered a blue plastic bag which contained two slabs of cannabis. SP2, testifying for the prosecution, confirmed that he was the owner of the house the police raided. He testified that at the material time he was in and with the accused who was visiting. The accused, said SP2, was indeed carrying a plastic bag. The defence of the accused was essentially a complete denial of the fact that he was carrying a plastic bag in his hand when he came into SP2's house. He further claimed that the drugs were found in a blue plastic bag in SP2's kitchen after he (the accused) had been arrested.

Held, convicting the accused as charged and sentencing him to death:

(1) In the instant case, the elements of the charge relating to the date, time

and place of the offence were proved by the prosecution and not challenged by the defence. With regard to the element of 'possession', SP4's and SP2's evidence clearly established that the accused had physical custody and control of the white plastic bag. The prosecution also chose to invoke the presumption of 'knowledge' under s 37(d) of the Act. Therefore the element of 'possession' had been clearly established. The court would further conclude upon a consideration of the evidence as a whole that the element of 'trafficking' had been made out for the purposes of establishing a prima facie case (see paras 19 & 25–27).

(2) From the facts, it was clear that there were two starkly different versions of events. Whereas the prosecution contended that the accused was seen carrying P9 and was therefore in possession of 1,749g of cannabis, the defence contended that the cannabis was found in the kitchen of SP2's house and therefore was never within the control or custody of the accused at any time. In the instant case, the High Court was not convinced that the defence version of events raised a credible or reasonable doubt as to the prosecution version of events and therefore rejected the same. In considering the accused's version of events the court reminded itself of the duty of the court when adjudicating on such a matter, even where the court is not convinced of the truth of the explanation put forth by the accused. *Mat v Public Prosecutor* [1963] MLJ 263 (followed). In the instant case, the accused had not succeeded in raising such a reasonable doubt in relation to the physical custody and control of the drugs contained in the plastic bag, P9 (see paras 62, 63, 69 & 70).

(3) Further, the prosecution's contention that the physical act of 'carrying' a bag containing the subject drugs, and pairing such 'carrying' with the weight of the subject drugs, would constitute 'trafficking' in the subject drugs, was an oversimplification of the law in relation to establishing 'trafficking' under the Act. Mere proof of one of the acts falling within the definition of 'trafficking' cannot in itself, coupled with the weight of the drugs, comprise or invite a finding of culpability for 'trafficking', without more.*Lim Hock Boon v Public Prosecutor* [2007] 4 CLJ 114 (followed) (see paras 72–73 & 76).

(4) In the instant case, the record of evidence showed that the sole fact that was conclusively proven was that the accused was carrying the subject plastic bag, identified by SP4 to be exh P9. There was no factual matrix or further circumstances to warrant the court making a finding that the accused was 'trafficking' in the subject drugs. It was conclusively proven that the accused had 'possession' of the subject drugs. The accused was guilty of having in his possession 1,749g of cannabis and not of 'trafficking' in that quantity of drugs (see paras 82–83).

[Bahasa Malaysia summary

Tertuduh telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 1,749g kanabis. Bagi pihak pendakwaan, SP4, pegawai polis tangkapan, telah memberikan keterangan bahawa dengan bertindak atas maklumat yang diterima, dia telah membawa pasukan polis ke sebuah rumah. Setiba di sana, mereka dengan segera menyerbu rumah tersebut. Tertuduh telah ditangkap di ruang depan dengan memegang beg plastik putih ('P9'), yang mana dia telah membuangnya serta merta ke lantai apabila melihat pasukan polis. Dari dalam beg tersebut. SP4 menemui beg plastik biru yang mengandungi dua papak kanabis. SP2, yang memberikan keterangan bagi pihak pendakwaan, mengesahkan bahawa dia pemilik rumah yang diserbu oleh polis. Dia memberikan keterangan bahawa pada masa matan dia di rumah dan bersama tertuduh yang sedang melawat. Tertuduh, seperti kata SP2, memang membawa beg plastik. Pembelaan tertuduh pada dasarnya merupakan penafian sepenuhnya tentang fakta bahawa dia telah membawa beg plastik dalam tangannya semasa dia masuk ke rumah SP2. Selanjutnya dia mendakwa bahawa dadah tersebut ditemui dalam beg plastik biru di dapur SP2 selepas dia (tertuduh) telah ditangkap.

Diputuskan, mensabitkan tertuduh seperti dituduh dan menjatuhkan hukuman mati ke atasnya:

(1) Dalam kes ini, elemen pertuduhan berkaitan tarikh, masa dan tempat kesalahan telah dibuktikan oleh pihak pendakwaan dan tidak dicabar oleh pihak pembelaan. Berdasarkan elemen 'possession', keterangan SP4 dan SP2 jelas membuktikan bahawa tertuduh mempunyai jagaan dan kawalan fizikal beg plastik putih itu. Pihak pendakwaan juga memilih untuk menggunakan anggapan tentang 'pengetahuan' di bawah s 37(d) Akta. Oleh itu elemen 'possession' jelas dibuktikan. Mahkamah selanjutnya akan memutuskan setelah mempertimbangkan keterangan secara keseluruhan bahawa terdapat elemen 'trafficking' bagi tujuan membuktikan kes prima facie (lihat perenggan 19 & 25–27).

(2) Berdasarkan fakta, adalah jelas bahawa terdapat dua versi yang amat berbeza tentang kejadian. Di mana pihak pendakwaan menegaskan bahawa tertuduh dilihat membawa P9 dan oleh itu memiliki 1,749g kanabis, pihak pembelaan menegaskan bahawa kanabis itu ditemui di dapur rumah SP2 dan oleh itu tidak pernah berada dalam kawalan atau jagaan tertuduh pada bila-bila masa. Dalam kes ini, Mahkamah Tinggi tidak yakin bahawa versi kejadian pihak pembelaan menimbulkan keraguan yang boleh dipercayai atau munasabah berbanding dengan versi kejadian pihak pendakwaan dan oleh itu telah menolaknya. Dalam mempertimbangkan versi kejadian tertuduh mahkamah diingatkan

tentang kewajipan mahkamah apabila mengadili perkara sedemikian, jikapun di mana mahkamah tidak yakin dengan kebenaran penjelasan yang dikemukakan oleh tertuduh. Dalam kes ini, tertuduh tidak berjaya menimbulkan keraguan munasabah berkaitan jagaan dan kawalan fizikal dadah yang terkandung dalam beg plastik itu, P9 (lihat perenggan); *Mat v Public Prosecutor* [1963] MLJ 263 diikut.

(3) Selanjutnya, penegasan pihak pendakwaan bahawa tindakan fizikal 'carrying' beg yang mengandungi dadah yang dipersoalkan, dan menggandingkan 'carrying' dengan berat dadah tersebut, yang membentuk 'pengedaran' dadah tersebut, adalah pemudahan undang-undang berkaitan dengan pembuktian 'trafficking' di bawah Akta. Bukti semata-mata tentang salah satu daripada tindakan yang terangkum dalam definisi 'trafficking' tidak boleh dengan sendirinya, bersama berat dadah itu, terdiri daripada atau mengundang suatu penemuan kebersalahan kerana 'trafficking' (lihat perenggan 72–73 & 76); *Lim Hock Boon v Public Prosecutor* [2007] 4 CLJ 114 diikut.

(4) Dalam kes ini, rekod keterangan menunjukkan bahawa satu-satunya fakta yang telah dibuktikan secara konklusif adalah bahawa tertuduh telah membawa plastik beg tersebut, yang dikenalpasti oleh SP4 sebagai eksh P9. Tiada matriks berdasarkan fakta atau keadaan selanjutnya untuk mewajarkan mahkamah membuat penemuan bahawa tertuduh telah 'trafficking' dadah tersebut. Ia telah dibuktikan secara konklusif bahawa tertuduh mempunyai 'possession' dadah tersebut. Tertuduh adalah bersalah kerana memiliki 1,749g kanabis dan bukan 'trafficking' kuantiti dadah itu (lihat perenggan 82–83).]

Notes

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

For cases on court, duty of, see 5(2) *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1695–1709.

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2945–2957.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337, FC (refd)
Lim Hock Boon v PP [2007] 1 MLJ 46; [2007] 4 CLJ 114, CA (folld)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Mat v PP [1963] MLJ 263, HC (folld)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Mohd bin Mohd Razali & Ors [2002] 5 MLJ 406, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16, HC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)
Tunde Apatira v PP [2001] 1 MLJ 259, FC (refd)

Legislation referred to

Criminal Procedure Code s 180, 182A
Dangerous Drugs Act 1952 ss 2, 6, 37(d), 39(b), 39A(2), 39B(1)(a), (2)
Misuse of Drugs Act 1973

Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Goh Kim Lian (Goh & Co) for the accused.

Nallini Pathmanathan JC:

[1] The accused in this case, Noorhaidi bin Mohd Noor Rahim ('accused') was charged with trafficking in 1,749g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which is punishable under s 39B(2) of the Act.

THE BACKGROUND FACTS AND THE EVIDENCE OF MOHD HUSNI BIN MANAF ('SP4')

[2] At about 5.30pm on 14 February 2005, Chief Inspector Mohd Husni bin Manaf ('SP4') led a team of fourteen police officers to premises bearing the address No 50, KTMB Quarters, Jalan Kastam, Pelabuhan Klang, to conduct a raiding operation. Earlier on in the day, at about 4.30pm, SP4 had received a report from a member of the public that there were drug activities going on at the said address. Upon arrival at the premises, SP4 noted that the front door was open. He also saw two men, one holding a white plastic bag and entering the house, while the other man was in the sitting room or hall. SP4 and his team immediately raided the house and announced themselves as policemen.

[3] The man holding the bag was the accused. The distance between SP4 and the accused was about sixteen feet in his estimation. SP4 described the

A accused as holding the white plastic bag by its handle in his right hand. SP4 and one detective corporal Palani arrested the accused while Lance Corporals Yatim and Taufek arrested the second man, one Mohd Nizar bin Salleh, SP2 ('SP2'). SP2 was the resident of the premises, and he lived there with his family.

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[4] SP4 then testified that he examined the white plastic bag which had the words 'FAJAR' printed on it (exh P10). Inside the white plastic bag was another blue plastic bag which contained two slabs of cannabis which were wrapped in aluminium foil and transparent cellophane tape, which he C suspected to be 'ganja'. SP4 examined the contents of the plastic bag in front of the two arrested persons. After this, SP4 searched the entire house, particularly the kitchen thoroughly, but found nothing.

[5] In the course of cross-examination, SP4 maintained that he had arrested D the accused in front of the main door to the house, while SP2 was in the sitting room. He stated that he had affected the arrest almost immediately upon arriving at the premises. He could not recall seeing a grey Kelisa bearing number plate WKM 7186 parked outside SP2's house, nor the accused's wife and child in the car. SP4 also stated that when he arrested the accused, the E accused released the white plastic bag he had been holding onto the floor.

[6] As for Mohd Nizar bin Salleh, ie, SP2, SP4 conceded that he had received information that he was a drug user. However, he denied finding any F implements utilised for the preparation and inhalation of drugs in SP2's home. He also rejected the contention put to him that the subject drugs were found in the kitchen rather than being carried by the accused.

[7] After the arrest and search, SP4 and his team took the accused and SP2 G back to the police station where they were remanded. SP4 then marked the various exhibits he had seized and also recorded the date on each of the exhibits. Accordingly the white plastic bag with the words, 'FAJAR' printed on it was marked as exh P9, while the blue bag within it was marked exh P10. The plant material comprising the two blocks of dried leaves after analysis, H were marked as exhs P11 and P12 respectively. Then the exhibits were surrendered to the investigating officer, Chief Inspector Ahmad bin Mohd Rambli, SP5 ('SP5'). A list setting out the various items seized which was signed by both the accused and SP2 bearing the date 14 February 2005 was produced, corroborating the fact that the exhibits were handed over to SP5.

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THE EVIDENCE OF MOHD NIZAR BIN SALLEH

[8] SP2 testified that on 14 February 2005 he was alone at his home at No 50, KTMB Quarters, Jalan Kastam, Pelabuhan Klang. His wife, a teacher was

at work, while his two children were away in the village. His evidence during examination in chief was brief. He stated that he was arrested by the police on 14 February 2005 together with another man, namely the accused. When asked at this stage why the accused came to his house, he stated that the purpose was to 'cut' drugs or '... untuk memotong bahan dadah'.

[9] SP2 testified that soon after the accused arrived, the police arrived. He estimated the difference in time to be less than a minute. When the accused entered the house, SP2 was in the sitting room. When asked whether Noorhaidi had anything with him when he came, SP2 stated that he was not sure and then that he was carrying a plastic bag. He was unable however to ascertain the colour of the plastic bag or its contents. This is what he said:

Q: Adakah apa-apa barang dengan Noorhaidi pada masa itu?

A: Tak pasti. Masa dia datang dia bawa satu beg plastik. Saya tak pasti warna beg plastik itu. Saya tidak tahu kandungan beg plastik itu. Saya tidak mengesan apa-apa dadah pada hari itu...

[10] The foregoing was SP2's evidence in examination in chief. In the course of cross-examination, SP2 conceded that he had been charged with using dangerous drugs. He had lived at his home for ten years. He explained that he had been alone at home all day on 14 February 2005 and had gone out only to purchase food. No one else had visited him at home that day either, save for the accused. He also testified that he had known the accused for many years as their respective fathers had been friends. They had grown up in the same area. He stated that when the police arrived the accused was in the sitting room too. According to him they had not even begun talking to each other when the police burst in. He could not recall whether he had gone out of the house to greet the accused upon his arrival and returned to the sitting room with the accused. He agreed however, that when he came back into the house, he went to the kitchen while the accused remained in the sitting room. After remaining in the kitchen, he returned to the sitting room. He stated that he was not away from the sitting room for long. When he returned, he saw that the accused was standing in the sitting room. The accused did not go to the kitchen. SP2 agreed that after he had left the kitchen and returned to the sitting room, the police arrived and caught him and the accused.

[11] SP2 recalled that the accused came with his wife and children, who was left waiting in the car. SP2 initially rejected the contention put to him that the accused had come to see him to loan him some money. However when it was put to him that he had called the accused on the telephone to borrow some money to renew his road tax, SP2 answered, 'possibly'. It was

then put to him that the accused and he were to discuss this matter, which explained his visit to SP2's house. His answer again was 'possibly'. He then agreed that the accused came to his house for this purpose.

[12] SP2 went on to agree that the police did not find any implements such as scissors or knives on the accused, that could be used for the purposes of 'cutting' drugs. When it was put to him that his statement that the accused came to his house to 'cut' drugs was untrue as no knives or scissors were found on him, SP2 agreed that his earlier testimony on this issue was not true.

[13] It was next suggested to him that while he and the accused were in the sitting room, the police found and seized a parcel which both the accused and SP2 had no knowledge of. SP2 agreed that this was a possibility. He also agreed that the parcel contained drugs. This is what he said:

Q: Saya katakan pada 14-2-05 polis telah menjalankan pemeriksaan ke atas rumah kamu?

A: Ya.

Q: Saya katakan polis ada periksa bahagian dapur?

A: Ya.

Q: Saya katakan semasa kamu dan tertuduh berada di ruang tamu polis ada berjumpa sesuatu bungkusan yang kedua-duanya kamu tak tahu?

A: Mungkin

Q: Saya katakan bungkusan itu adalah dadah?

A: Ya, setuju.

Q: Saya katakan bungkusan itu satu bungkusan plastik?

A: Setuju. *Bungkusan plastik itu dijumpai di atas lantai*. Saya tidak boleh nampak ruang dapur dari ruang tamu. *Saya tahu polis berjumpa bungkusan di atas lantai, kerana polis pegang dan tunjuk kepada saya*. (Emphasis added.)

Q: Bila polis tunjuk bungkusan di mana kamu berada?

A: Di antara ruang tamu dan dapur.

Q: Pada masa itu mana tertuduh berada?

A: Di ruang tamu.

And further on in cross-examination:

Q: *Adakah Nizar pasti atau tidak bahawa tertuduh bawa sesuatu plastik ke dalam rumah bila masuk?*

A: *Pasti, dia ada membawa plastik beg.*

Q: *Saya katakan semasa Tertuduh masuk ke dalam rumah dia tidak membawa apa-apa beg.*

A: *Tidak setuju.* (Emphasis added.)

EVIDENCE OF OTHER WITNESSES

[14] Apart from the two primary witnesses relating to the actual events that transpired on 14 February 2005, the rest of the witnesses in this case were SP5, the investigating officer, one Syed Faizul Shah bin Syed Hussain Shah, SP 6 ('SP 6') who was the finger prints expert who could find no usable prints on the plastic bag or its contents. His evidence was therefore equivocal at best. Apart from him the only other witnesses were the chemist, Puan Wan Rahimah bt Wan Ahmad, SP 3 ('SP 3') who explained how she analysed the subject drugs found in exh P9. She confirmed her findings that the two slabs, exhs P11 and P12 comprised 898 and 851g of cannabis respectively, totaling 1,749g of cannabis. Her evidence was not substantially in dispute. The only other witness who testified was the photographer.

[15] In summary, on the basis of the evidence of SP4 who gave evidence that the accused had physical custody and control of exh P9 containing the drugs, the prosecution maintained that the issue of physical custody and control was made out. This was further corroborates, it was contended by the evidence of SP2 who maintained that the accused had been carrying a plastic bag when he came in. This plastic bag was found on the floor and examined by the police in their presence and found to contain drugs. As physical custody and control had been established, the prosecution then prayed in aid the statutory presumption under s 37(d) of the Act which enabled the element of possession to be established.

BURDEN ON THE PROSECUTION

[16] The burden on the prosecution at the close of the prosecution case is to make out a prima facie case as is encapsulated in s 180 of the Criminal Procedure Code. As expounded in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017

A it is incumbent upon this court to undertake a maximum evaluation of the prosecution evidence so as to be able to make a decision as to whether or not the accused should be called upon to make his defence. If, after undertaking such an exercise, the court concludes that a prima facie case has not been made out, the accused is to be discharged. If however the court concludes that
B a prima facie case has been made out, then the accused will be called upon to enter his defence. In the event the accused chooses to remain silent, the court must then convict him on the evidence before it, without undertaking any further evaluation exercise. As stated by Gopal Sri Ram JCA in *Pendakwa Raya v Mohd Radzi bin Abu Bakar*:

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> ... Put shortly, what the trial court is obliged to do under ss 174(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called.
D And if the accused remains silent, he must be convicted. If the answer is in the negative the accused must be acquitted ...

THE INGREDIENTS OF THE CHARGE AGAINST THE ACCUSED

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[17] What are the ingredients that need to be satisfied in order to establish the offence of trafficking in drugs?

[18] While this is considered in greater detail later on in the case, suffice to
F say at this juncture that the primary ingredients that have to be proved are that:

(a) On 14 February 2005 at 5.30pm at No 50, KTMB Quarters, Jalan Kastam, Pelabuhan Klang;

G (b) The accused was 'trafficking' in 1,749g of cannabis, in contravention of s 39B of the Dangerous Drugs Act 1952.

Element (i): *The date, time and place*

H **[19]** These facts have been proved by the evidence of, inter alia, SP4 and SP2 as outlined above. No challenge was made as to these facts by the defence. These elements of the charge are therefore satisfied.

Element (ii): *That the accused was 'trafficking' in 1,749g of cannabis*

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[20] 'Trafficking' is defined in the Act as follows:

> *In this Act, unless the context otherwise requires — 'trafficking' includes* the doing any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, *transporting, carrying*, sending, delivering, procuring, supplying or distributing any dangerous drug [otherwise than under the authority of this Act or the regulations made under the Act].

[21] In the instant case, the charge of trafficking relates to the 'carrying' or 'transporting' of the subject drugs which were found in the white plastic bag, exh P9 carried by the accused. However in order to establish the element of 'trafficking' against the accused, it is necessary in the first instance to prove that the accused was in 'possession' of the quantity of 1,749g of cannabis. In other words, the element of 'possession' is a precursor to that of 'trafficking'. It is not possible to 'traffic' in dangerous drugs unless the accused is found to have been in 'possession' of those drugs. Accordingly it is necessary that the prosecution prove the inherent element of 'possession' in establishing a prima facie case against the first and second accused of 'trafficking' by transporting.

POSSESSION

[22] In relation to the ingredient of 'possession' I rely upon a passage in an earlier case I decided, namely *Public Prosecutor v Lee Yau Ket* where I stated as follows:

> Possession is not defined in the Dangerous Drugs Act 1952. However it has been defined in numerous cases since. It comprises both a physical and mental element. The physical element is demonstrated by exclusive dominion and control over the subject property, such that the person in possession is able, solely, to do as he pleases/wishes with that property. The mental element or 'mens rea' is denoted by conscious knowledge of the existence and nature of the subject property. If both these constituent elements can be established from the surrounding facts, then it can be said that 'possession' has been established. Direct evidence of each of these elements is the best manner of proof. However, the element of conscious knowledge and existence of the subject property is often not easily established by direct evidence alone, and in matters falling within the Dangerous Drugs Act 1952, the law supports the determination of this issue by allowing for reliance in the form of a rebuttable presumption in s 37(d) of the Act. It provides:
>
> > ... any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[23] In the instant case, the prosecution submitted that it was relying on the statutory presumption in s 37(d) of the Act to establish that the accused had the requisite knowledge of the existence and nature of the 1,749g of cannabis. The question that therefore arises for consideration is whether the accused had physical custody and control of the subject drugs.

(i) On the basis of the evidence of SP4, it was apparent that the accused was caught holding a white plastic bag containing drugs, when the police team raided the subject premises on 14 February 2005. The accused had let the bag, exh P9, fall to the floor when the police arrested him, according to SP4. As such it had been proved that the accused had physical custody and control of exh P9, the white plastic bag, with the words 'FAJAR' printed on it. And exh P9 contained dried plant material which contained 1,749g of cannabis in two slabs which were wrapped in aluminium foil and cellophane tape. As such it followed that at the material time, the accused had physical custody and control of the 1,749g of cannabis as the drugs were found in the white plastic bag, P9 which he was holding and seen carrying.

(ii) The evidence of SP4 was supported by the evidence of SP2 who maintained categorically that the accused was carrying a plastic bag when he entered the house. SP2 also maintained in the course of cross-examination that the plastic bag containing the drugs was found on the floor by the police. When his evidence is considered in conjunction with that of SP4 who maintained that the accused released the white plastic bag he was carrying onto the floor, it follows that SP2's evidence corroborates that of SP4's namely that the accused was carrying a plastic bag containing drugs. It is this plastic bag that the police seized when they arrested the accused on entering the house. On the basis of SP4 and SP2's evidence, the issue of physical custody and control of the white plastic bag and therefore the drugs contained in it, appeared to me to have been clearly established.

[24] On the premise that physical custody and control of exh P9 containing the subject drugs had been established, it followed that with the application of the statutory presumption under s 37(d) of the Dangerous Drugs Act ('the Act') the accused was deemed to have knowledge of the nature of such drugs. The provision states as follows:

> ...(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug...

[25] The element of 'possession' was thus fulfilled.

[26] To turn to the element of trafficking; the learned deputy public prosecutor submitted that this element was fulfilled by reason of the weight of the drugs found in the accused's possession as well as the fact that he was seen carrying the plastic bag, P9 into the house and then holding it, thereby falling within the definition of 'transporting' the drugs in s 2 of the Act. In support of this proposition, the prosecution cited the cases of *Public Prosecutor v Abdul Manaf Muhammad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 and *Mohd Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241. The proposition put forward was that this court was bound by virtue of the decisions above to conclude that 'trafficking' had been made out, primarily on the basis of weight, and the fact that 'carrying' falls within the definition section of 'trafficking' in s 2 of the Act. This submission will be dealt with later on in the judgment.

[27] Nonetheless after anxious consideration of the relevant passages in the two aforesaid cases, I did conclude that on a consideration of the evidence as a whole, and not simply the weight, or the definition section in vacuo, that the element of 'trafficking' had been made out for the purposes of establishing a prima facie case. My reasons for so concluding were that the following facts taken in toto warranted such a finding at the prima facie stage:

(a) the accused was seen carrying the exh P9 containing the drugs into SP2's house;

(b) within a minute of the accused going into the house, SP4 had arrested him, while he was holding exh P9;

(c) he then released exh P9 onto the floor, according to SP4;

(d) SP2 corroborated this fact to the extent that he stated that the accused was carrying a plastic bag when he entered the house;

(e) SP2 stated that a plastic bag was found on the floor of the sitting room;

(f) proof of purpose, it appeared, was made out by the fact that the weight of 1,749g of cannabis was far in excess of the amount that could be used by any one person for himself; and

(g) The fact that SP2 had been charged with using drugs himself considered in conjunction with the fact that the accused was bringing exh P9, containing a large quantity of drugs, to SP2's house suggested that he was transporting the drugs to SP2's house or for SP2.

[28] In the course of his evidence SP2 had initially stated that the accused had come to his house to 'cut' drugs. However in the course of cross-examination he retracted this statement, instead conceding that it was possible that the accused had come by to discuss a loan of monies for renewal of road tax with him. His evidence on this issue was far from satisfactory or

clear, leaving the court with no real ability to ascertain the purpose of the accused's visit. However, for the purposes of assessing the prima facie case against the accused, this portion of the evidence relating to the 'cutting' of drugs was assessed and discarded as being unreliable in view of SP2's answers on this issue as a whole. It therefore did not comprise a part of the evidence that the court took into account in arriving at a finding that a prima facie case had been established.

[29] Accordingly on 24 October 2008 the accused was ordered to enter his defence to a charge of trafficking.

THE EVIDENCE OF THE ACCUSED

[30] The three options available to the accused were made known to him. He chose to give evidence on oath, thereby agreeing to be cross-examined on his testimony. His version of events differed somewhat from the version above in relation to the exh P9.

[31] The accused stated that on 14 February 2005 he drove to SP2's house in his car, a grey Perodua Kelisa. His wife and children were present in the vehicle. He had never been to SP2's house before. However he used to meet SP2 outside his home at coffee shops from time to time. As stated by SP2 he confirmed that he had known SP2 while growing up as their fathers were friends. He also stated that he was aware that SP2 was a drug addict. According to the accused, he went to SP2's house because he was loaning him monies for payment of road tax for his taxi. In his evidence, SP2 had admitted that he had a taxi which he used for transport. When they arrived at SP2's house, the accused parked his car in front of the door to SP2's house, approximately twenty feet away. He got down and went to the house. His wife did not accompany him because the children were asleep in the car. According to the accused, he left the engine of his car running while he went inside.

[32] The accused was categorical that he did not carry anything into the house. He maintained that he was not carrying a plastic bag. As he entered the house and the sitting room and started talking to SP2, the police burst in. He estimated the time between his entry to the sitting room and the police entering the house as about one minute. He was asked 'di mana barang?' or 'where are the goods?' by one of the personnel, and his reply was 'what goods?' where upon he was arrested. He was handcuffed with his hands behind his back and someone stood guard over him as he remained in the sitting room.

[33] The rest of the police team in the meantime carried out a search of the

premises. They went into the kitchen. According to the accused they took SP2 with them. After five or ten minutes in the kitchen, the accused stated that the police personnel emerged carrying a blue parcel from the kitchen, with SP2 accompanying them. They showed the blue parcel to SP2. The accused maintained that he was approximately two to three metres away from them, as they showed the blue plastic bag and its contents to SP2.

[34] Thereafter the police arrested the accused's wife as well as SP2 and took them to the police station. SP2 and he were remanded for thirteen days, after which the accused was charged and SP2 released.

[35] The accused was remanded in custody after being charged. On the very first occasion that he was accorded legal representation, the accused presented a written statement of the events of 14 February 2005 to his lawyers and instructed them to lodge a police report to that effect. This report was made on 13 April 2005 at 3.10pm at the Sungai Buloh Prison. His lawyers duly sent a copy to of this statement to be lodged to the chief of police in Klang on 16 April 2005. There was no response from the police. The letter from the accused's solicitors and his statement were produced in court (exh D22).

[36] In summary, the accused's version of events was that he was not arrested while carrying the plastic bag containing the drugs, ie, exh P9, but that a blue plastic bag, namely exh P10 was found in the kitchen of Nizar's house. The accused's version of events directly challenged the veracity of the evidence of SP4 that he carried a bag containing a large quantity of drugs into SP2's house.

[37] The one other issue raised by the accused in the course of his evidence related to a meeting between him and the investigating officer, SP5 who came to take a statement from him in relation to the forfeiture of his vehicle, that he had driven in to SP2's house. As stated above, it was a Perodua Kelisa, bearing number plate WKM 7186 (this corroborates the the accused's version of events that he was driving the grey Kelisa with his wife and child inside the car). According to the accused, SP5 told him to admit possession of the plastic bag containing the drugs. The accused maintained that he denied all knowledge of the subject drugs, whereupon SP5 said '... kalau lima orang polis cakap barang dekat tangan, awak habis', which, when translated to English means '... if five policemen state that the drugs were in your hand, you are finished'. When this incident and statement were put to SP5 during the course of cross-examination he stated that he did visit the accused, but could not recall making the statement attributed to him by the accused. He did not however, deny outright making such a statement.

[38] In the course of cross-examination, the accused maintained his version of events. When questioned as to the day of the occurrence, he stated that it was a Monday or a Tuesday, and that he was able to be present at SP2's house at 5.30pm because he worked as a supervisor with a construction firm and his working hours were flexible. He explained that he was not sure how much money SP2 required, but that he had about RM400 to RM450 in his wallet. He barely had time to hand discuss or hand over money to SP2 when the police arrived. When queried about the fact that such a sum of money had not been produced in court as one of the items seized that day, he explained that his money and wallet had not been seized. Only his driving license, national registration identity card and handphone were taken by the police. His credit card and wallet were returned.

[39] He disagreed with the proposition put to him that he had not come to SP2's house to loan him monies. He also disagreed with the contention that he carried the white plastic bag with the words 'FAJAR' printed across it, exh P9, and containing the subject drugs (P11A and P12B) in a blue plastic bag, P10 within P9. He was clear and categorical in his response that the drugs were retrieved from the kitchen by the police personnel while SP2 was with them, and which was brought into the sitting room where he was detained, having been handcuffed.

[40] When the accused had completed his testimony, the defence indicated that it would call the wife of the accused, but failed to procure her attendance. The defence called no further witnesses and closed its case.

A CONSIDERATION OF THE EVIDENCE AS A WHOLE

[41] At the close of the defence, the court then embarked upon a reading of the evidence on record as a whole, so as to give consideration to the entirety of the evidence in the context of both the prosecution and defence case. Having done so, it was evident that there was before the court two starkly different versions of the events of 14 February 2005. While the prosecution case, in essence, vide SP4 was that the accused was seen carrying and was therefore in possession of 1,749g of cannabis, the defence version of events was that the 1749g of cannabis were found in the kitchen of SP2's house and therefore never within his control or custody at any time.

THE DUTY OF THE COURT AT THE CLOSE OF THE DEFENCE CASE

[42] In accordance with s 182A of the Criminal Procedure Code, the duty on the court at the close of the defence case, is set out as follows:

(1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it.

(3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

[43] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, the Federal Court defined 'proof beyond reasonable doubt' thus:

> Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[44] And in *Public Prosecutor v Mohd bin Mohd Razali & Ors* [2002] 5 MLJ 406:

> It is clear that at the end of the trial, the court will have to weigh all the evidence that had been adduced and to make a ruling whether the prosecution has proved its case beyond reasonable doubt or otherwise.
>
> Having weighed the evidence if the court is satisfied that the prosecution has proved the charge beyond reasonable doubt, the court will have to find the accused guilty of the charge and thereafter convict him. On the other hand, if the court rules that the prosecution has not proved the charge on the evidence adduced against the accused, then the accused will be acquitted and discharged. In other words, at the end of the trial the court will have to rule whether the defence has raised a reasonable doubt as to the truth of the prosecution's case or the guilt of the accused. This is because a case which has been proved beyond reasonable doubt in itself involves the absence of a reasonable doubt. In support of the said proposition reference may be made to the case of *Mah Kok Cheong v R* [1953] MLJ 46 where His Lordship Spencer Wilkinson J at p 47 stated the following:

> ... In ordinary criminal cases, all discussions as to what might reasonably be true or what is consistent with innocence is both irrelevant and misleading. Almost every defence put forward by an accused is consistent with innocence or it would not be put forward or it would not be a very good defence it could not reasonably be true. But whatever may be the defence to a criminal charge the sole question which a subordinate has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say 'the sole question' advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case.

[45] And in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J stated as follows in explaining 'reasonable doubt':

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the change.

Does the evidence of the accused raise a reasonable doubt in respect of the prosecution case?

[46] As stated above, this question requires a detailed consideration of the evidence in toto.

[47] The evidence from both the prosecution and defence cases appeared to be directly in conflict.

[48] The prosecution had called SP4 to establish that the accused was carrying a large quantity of drugs in a carrier bag into SP2's house. The accused on the other hand maintained that those same drugs had been found in the kitchen of SP2's house after he had been handcuffed in SP2's sitting room immediately upon entry to loan SP2 some monies. In short, that he was never in possession of the subject drugs. It becomes apparent therefore that SP2's evidence is of essential importance in seeking the factual veracity of what happened on the day.

[49] A close perusal of SP2's evidence will show that he stated in examination in chief that he saw the accused carrying a plastic bag. He did not describe the plastic bag in terms of its colour or the writing printed on it, as he stated that he was unable to recollect these facts. As a consequence, he was not called upon to identify the object or plastic bag that he stated the accused was carrying, albeit from the photographs or the exhibits themselves.

However, he was categorical in his replies that the accused did carry a plastic bag into his house. This is what he said in the course of cross-examination:

Q: Adakah Nizar pasti atau tidak bahawa tertuduh bawa sesuatu plastik ke dalam rumah bila masuk?

A: Pasti, dia ada membawa plastik beg.

Q: Saya katakan semasa tertuduh masuk ke dalam rumah dia tidak membawa apa-apa beg.

A: Tidak setuju.

[50] When this evidence is coupled with SP4's unequivocal evidence that the accused was carrying a plastic bag which he released or threw on the floor when he saw SP4 and his team, it is evident that SP2's evidence corroborates SP4's evidence that the accused was carrying a plastic bag. Additionally, SP2 testified that the police found a plastic bag containing drugs on the floor of the house in front of both himself and the accused, in the course of cross-examination:

Q: Saya katakan semasa kamu dan tertuduh berada di ruang tamu, polis ada berjumpa sesuatu bungkusan yang kedua-duanya kamu tak tahu?

A: Mungkin

Q: Saya katakan bungkusan itu adalah dadah?

A: Ya, setuju.

Q: Saya katakan bungkusan itu satu bungkusan plastik?

A: Setuju.

Bungkusan plastik itu dijumpai di atas lantai. Saya tidak boleh nampak ruang dapur dari ruang tamu. Saya tabu polis berjumpa bungkusan di atas lantai, kerana polis pegang dan tunjuk kepada saya.

Q: Bila polis tunjuk bungkusan di mana kamu berada?

A: *Di antara ruang tamu dan dapur.*

Q: Pada masa itu mana tertuduh berada?

A: *Di ruang tamu* (Emphasis added.)

[51] From the foregoing it is evident that a plastic bag containing drugs was found by the police on the floor of the sitting room, while the accused was standing in the sitting room and SP2 between the kitchen and the sitting room. The drugs were shown to both SP2 and the accused. When this

evidence is considered in conjunction with SP2's earlier evidence that the accused was carrying a plastic bag when he entered the house, it is apparent that the plastic bag found on the floor with the drugs was the plastic bag carried by the accused. No other plausible explanation is possible.

[52] This nearly corroborates SP4's version of events, namely that the accused was carrying the subject drugs in a white plastic bag, exh P9 which he dropped upon sighting the police entering the house. Exhibits P9, P10, P11 and P12 were moreover produced, marked and identified by SP4 in court.

[53] As against this evidence, the accused maintains that he simply did not carry any such plastic bag into the house. Instead he maintains that he came to loan monies to SP2 for renewal of his road tax for his taxicab. It is incumbent upon the court to consider whether his version of events raises a reasonable doubt in the prosecution's case when the entirety of the evidence is considered in toto.

[54] SP2 when asked in the course of examination in chief why the accused had come to his house replied voluntarily that the accused came to 'cut' drugs.

Q: Mengapa Noorhaidi datang ke rumah awak?

A: Noorhaidi datang ke rumah saya untuk memotong bahan dadah.

[55] As stated above, I discounted this evidence because he retracted this statement in the course of cross-examination. But he did not volunteer the fact that Noorhaidi came to his house to loan him monies for renewal of his road tax. Instead this answer had to be coerced out of him in the course of cross-examination, and even then his answers were 'possibly', not a positive affirmation of this fact. It would be expected that as the recipient of a loan of monies urgently needed to renew his expired road tax, that he would have readily volunteered this information. His answers instead were as follows:

Q: Saya katakan 2-3 hari sebelum tangkapan awak menjemput beliau ke rumah untuk membincang sesuatu?

A: Tidak setuju.

Q: Awak telah telefon tertuduh untuk datang ke rumah untuk meminjam wang?

A: Tidak setuju

Q: Saya katakan awak menelefon tertuduh untuk meminjam wang untuk membaharui road tax?

A: Mungkin

Q: Sebab itulah awak perlu berbincang dengan Noorhaidi?

A: Mungkin.

Q: Sebab itulah Noorhaidi patut datang ke rumah awak untuk berbincang?

A: Setuju.

[56] Overall his answers in response to these questions were at best, reluctant. SP2 was not asked at any stage how much money he intended to borrow, or how much he needed for the road tax renewal. No attempt was sought to ask SP2 to produce documentation relating to the renewal of road tax or even his vehicle, with a view to establishing that the accused's visit had indeed been for the purposes of a loan of monies. Neither did the accused volunteer or have knowledge of the quantum required, save that he did say that he had available about RM400 or RM450 in his wallet for this purpose.

[57] The accused did not call any other witnesses, including his wife who was allegedly present outside in the car when these events occurred. In the absence of any other evidence, the net effect of the accused's version of events was in effect a complete denial of the fact that he was carrying a plastic bag in his hand when he came into SP2's house. In the face of the clear and categorical evidence of SP4 and SP2 on this issue, coupled with the production of the actual exhibits found in SP2's house, his evidence that he was not carrying anything when he entered the house appeared to be an attempt to circumvent or counter the evidence of the prosecution case.

[58] The accused's testimony that the subject drugs were found in a blue plastic bag in the kitchen after he had been arrested was in direct conflict with that of SP4 and SP2.

[59] Neither did the accused identify the blue plastic bag, exh P10 as being the exhibit that was found in the kitchen. Ultimately there was no reason to reject the categorical evidence of SP4 and SP2 that they each saw the accused coming into the house carrying a plastic bag. Their evidence on this issue was not impeached, and the defence version of events also failed to throw doubt on the veracity of their evidence.

[60] In arriving at this conclusion, it was incumbent upon the court to consider the evidence of these three witnesses in totality. The accused's testimony appeared to be designed to provide a defence to the very serious

charge of trafficking made out against him. There appeared to be no basis for SP4 and SP2 to both categorically state that he was carrying a plastic bag, if indeed he was not doing so.

[61] In this context I considered whether SP2 was fabricating the evidence of the accused carrying the bag, simply to escape the possibility that the plastic bag was found in the kitchen. However this was never put to SP2. More importantly, SP2 was careful and accurate in his evidence in that he pointed out that while he was clear that the accused was carrying a plastic bag, he could not remember the colour of the bag or the words printed on it. In short, the one clear piece of evidence that arose in the course of the prosecution case, was that the accused was carrying a plastic bag. And that plastic bag was subsequently discovered to contain drugs.

[62] As such the defence version of events failed to raise a reasonable doubt in the face of SP4 and SP2's evidence. More so in light of the production of exhs P9 and P10 which were accordingly marked at the material time. The fact that the accused was carrying the bag was, on the evidence, clear beyond dispute.

[63] The defence version that a blue plastic bag of drugs had been found in the kitchen was not borne out by any of the witnesses except for the accused. SP2's evidence on this is crucial and as detailed above, SP2 was clear that the plastic bag containing drugs was found on the floor of the sitting room and not the kitchen. He could not see into the kitchen from where he was. However he did see the plastic bag on the floor which was picked up by the police, opened and the contents shown to him. On the basis of this evidence from SP2, SP4's evidence stands corroborated on material matters and warrants a rejection of the accused's version of events. I was not convinced that the defence version of events raised a credible or reasonable doubt as to the prosecution version of events and therefore rejected the same.

Police report lodged by the accused

[64] In rejecting the defence version of events, I also considered the fact that the accused had lodged his version of events as soon as he reasonably could after having procured and obtained legal advice. His version of events as set out in the police report, exh D17 comprised his evidence in court. For the reasons set out above, I concluded that this version of events did not have the effect of raising a credible doubt in view of SP4 and SP2's evidence in relation to the fact that he was carrying exh P9 containing the subject drugs.

[65] The acts and words of the investigating officer, SP5, while the accused

was being held in custody, amounted to an attempt to threaten or coerce him into admitting that he had custody of the subject drugs. SP5 could not recall whether or not he had indeed uttered such a threat. Such conduct, if true, is deplorable and completely unwarranted, as it is indeed a threat and would have caused the accused considerable fear. In the instant case, it had no discernible effects on the outcome of this case, as the accused was not thus coerced or forced into giving an admission or statement as suggested.

Where precisely in the sitting room was the accused arrested, at the front door or in the sitting room?

[66] One other issue that was raised by counsel for the accused was that SP4 was inconsistent in his account as to the precise location in SP2's house where the accused was arrested. SP4 initially stated that the arrest was effected outside or in front of the front door to SP2's house, while the sketch map of the premises, exh P18, drawn by SP5 depicts the arrest as having occurred in the sitting room, a few feet farther in and away from the front door. SP5 had drawn the sketch plan on the basis of instructions from SP4.

[67] A perusal and comparison of these two statements will show a disparity of several feet in relation to the precise location where the accused was arrested. I did not consider this difference to be of such significance so as to warrant it being viewed as a material contradiction, because it had no bearing on the fact that SP4 remained consistent in his account that the accused was seen carrying the plastic bag, subsequently found to contain drugs. And this was borne out by SP2.

[68] In short this issue could not detract from the fact that the accused was seen by two witnesses carrying a plastic bag into the house which was found, on examination to contain a large quantity of drugs. The fact of the accused carrying a bag of drugs is the material fact which was clearly established in the course of the entire case. This is moreover a straightforward fact which does not require complex deliberation. The accused was either carrying the subject bag, exh P9 or not. The preponderance of evidence shows that he was, and the accused produced no credible evidence to throw doubt on this issue.

[69] It must be said in all fairness to the accused that his evidence was direct and unfaltering. However for the reasons stated above, the court was unable to accept his evidence and found it to be unreliable. In considering the accused's version of events I reminded myself of the duty of the court when adjudicating on such a matter, even where the court is not convinced of the truth of the explanation put forth by the accused. As stipulated in *Mat v Public Prosecutor* [1963] MLJ 263:

> ... If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it ...

[70] The fundamental principle of criminal law in relation to the burden of proof is that the burden of proving the guilt of the accused is throughout on the prosecution. If there has been a failure to satisfy the onus of proof upon it, it means that the accused has succeeded in raising a reasonable doubt in respect of the prosecution's version of events, namely that the accused was carrying exh P9 and thereby in possession of the subject drugs. To my mind, on the facts of the case, taken as a whole, the accused has not succeeded in raising such a reasonable doubt in relation to the issue of the physical custody and control of the subject drugs contained in the plastic bag, exh P9. The consequence of such a finding is with the assistance of the statutory presumption under s 37(d), the element of 'possession' is established.

Trafficking

[71] It remains to be considered whether the element of 'trafficking' has been established, for the purposes of ascertaining whether the charge against the accused has been proved.

[72] The submission made by the prosecution was that one of the physical acts set out in the definition of 'trafficking' under s 2 of the Act has been established, namely the 'carrying' of the subject drugs. When the evidence of such a physical act is paired with the weight of the subject drugs, the contention was that these two indicia were sufficient to warrant the conclusion that 'trafficking' had been established.

[73] On the facts of this case, for instance, the contention put forward was that by proving the physical act of 'carrying' a bag containing the subject drugs, and pairing such 'carrying' with the weight of the subject drugs, namely 1,749g of cannabis, the resultant conclusion could only mean that the accused in the instant case was 'trafficking' in the subject drugs. The foregoing appeared to be an over simplification of the law in relation to establishing 'trafficking' under the Act.

[74] The correct mode of approach to ascertain whether the element of 'trafficking' has been made out has been set out in numerous cases of high authority, including *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46;

[2007] 4 CLJ 114 where the Court of Appeal dispelled the notion of relying primarily on the definition section in the Act. This is what the court said:

> ... In his response to the appeal, the learned deputy argued that even if the appellant was not found in possession of the drug in question within s 37(da) of the Act, his conviction could nevertheless be upheld on the alternative ground advanced by the learned judge. The alternative ground is that the accused was guilty of trafficking because his case came within one or more of the acts set out under the definition of the word 'trafficking' in s 2 of the Act. With respect, both principle and authority are against hits argument.
>
> First the principle. It is settled law that a definition section in an Act of Parliament does not create an offence. The function of a definition section was described in the joint judgment of Barwick CJ, McTieman and Taylor JJ in *Gibb v Federal Commissioner for Taxation* (1966) 118 CLR 628, at p 635 as follows:
>
> > The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense — or are to be taken to include certain things which, but for the definition, they would not include. *Such clauses are, therefore no more than an aid to the construction of the statute and do not operate in any other way.* Consequently the effect of the Act and its operation in relation to dividends as defined by the Act must, we think, be found in the substantive provisions of the Act which deal with 'dividends', (Emphasis added.)

[75] As for authority, reference need be made to only two cases. In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, Lord Diplock, after referring to the very wide definition of the expression 'trafficking' in the Misuse of Drugs Act 1973 said:

> This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possession of the substantive offence. To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.
>
> In *Chow Kok Keong v Public Prosecutor* [1988] 2 CLJ 469, Edgar Joseph Jr SCJ said:

A And, we have also noted, the judge had relied on the Supreme Court case of *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162, where the court briefly considered the effect of the definition of trafficking aforesaid and, in particular the court observed:

> B The definition of 'trafficking' in the Act is wide and includes not only buying and selling but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor* [1981] C 1 MLJ 64.

The judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 3 MLJ 289, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous D drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v Public Prosecutor* [1994] 2 MLJ 210, the Supreme Court followed *Cohen*.

E In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as over simplistic.

F *It is clear that Chow Kok Keong tolled the death knell of Teh Geok Hock. With it came to an end the misconception that the definition of trafficking in s 2 of the Act could be prayed in aid at any stage of a case to impose criminal liability on an accused*, ... (Emphasis added.)

G **[76]** It is evident from the foregoing that mere proof of one of the acts falling within the definition of 'trafficking' cannot in itself coupled with the weight of the drugs, comprise or invite a finding of culpability for 'trafficking', without more.

H *The weight of the subject drugs*

[77] The contention that the weight of the drugs seized or found on an accused person comprises in itself a conclusive indicator of 'trafficking' does not appear to reflect the correct position in law. While the weight of the drugs I is one salient factor that is to be considered in the context of the entirety of the circumstances in which the accused person was found in possession of the subject drugs, it cannot of itself determine whether or not a person is a 'trafficker' or 'trafficking' in dangerous drugs under the Act. Support for this proposition is to be found in numerous cases, including *Mohamad Yazri bin*

Minhat v Public Prosecutor [2003] 2 MLJ 241 and *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129. These cases in turn refer to the famous and oft-cited passage of LJ Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

[78] The Court of Appeal in *Mohamad Yazri bin Minhat* after citing the above mentioned passage from the case of *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337, held as follows in explaining what amounted to 'trafficking' under the Act:

> ... *In our view, Chow Kok Keong is an important decision. Quite apart from the fact that it is binding on us, it demonstrates the importance of having regard to the facts of a particular case to determine whether the elements of trafficking had been made out. It reminds us that the general definition of trafficking found in s 2 of the Act is subject to the context of the particular case.* It restates in outline the route already taken by Lord Diplock in *Ong Ah Chuan v Public Prosecutor*; *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 at p 68:
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> > To traffic in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking 'transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport', although it must involve possession of the drugs by the person who transport them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb 'transport' to which attention has been drawn, attracts the maxim *noscitur a sociis*. This and the fact that it appears in the definition of the verb 'to traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s 3 with its draconian penalties is directed.

The Court of Appeal of British Columbia in *R v McDonald* [1963] 43 WWR 337 at p 342, interpreted 'transport' in the virtually identical definition of 'traffic' in the Canadian Narcotic Control Act 1960–61, as bearing this restricted meaning and the same interpretation was adopted by the Court of Appeal of Newfoundland in *R v Greene* (1977) 74 DLR 3d 354. Acceptance of it is implicit in the ratio decidendi of the Court of Criminal Appeal of Singapore in *Wong Kee Chin*. So simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorised by the Act or Regulations, involves an offence of having the drug in one's possession under s 6 but does not amount to the offence of trafficking under s 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of s 10 of the Drugs Act and s 3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purposes irrelevant to his guilt of the offence of trafficking under s 3; since they provide that a person who does any act preparatory to, or in furtherance of or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under s 29 and the Second Sch.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in Their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to he able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

> As a matter of common sense, the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s 15. In the instant cases, however, the quantities involved were respectively 100 times and 600 times the statutory minimum.
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> Whether the quantities involved be large or small, however the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under s 3.
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> We have quoted at length from Lord Diplock's judgment to demonstrate the value of direct evidence led before the learned judge and now in the record of appeal provided at us.
>
> *To summarise, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into* (Emphasis added.)

[79] It is clear from the foregoing that weight in itself comprises a salient determinant of the purpose for which the drugs are being carried, conveyed or transported. However the 'weight' factor must still be considered in the context of the entirety of the circumstances of the particular case against an accused person.

[80] In *Mohamad Yazri bin Minhat v Public Prosecutor* the accused person was found in actual possession of 133kg of cannabis. The entirety of the circumstances was accorded consideration prior to the conclusion being reached that the accused was 'trafficking'. However the quantity of drugs was so large as to warrant special mention and consideration. And in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 although the quantity of drugs was less, the manner in which the drugs had been packed namely in small quantities in numerous packets which were found on various parts of the accused person's clothing and body, it could legitimately be inferred, from the totality of the circumstances that 'trafficking' had been established. The Federal Court in meticulous detail set out the entirety of the passage quoted above from the decision in *Mohamed Yazri bin Minhat v Public Prosecutor* thereby confirming that the correct approach to ascertaining the ingredient of 'trafficking' is to give consideration

to the entirety of the circumstances of a particular case, with the weight of the subject drugs being one of the salient factors warranting deliberation.

[81] Another factor that militates against reliance on a formula comprising a consideration of solely the weight of the drugs found in the possession of the accused person, coupled with one of the physical acts set out in s 2 to establish 'trafficking', especially where 'possession' is proved by use of the statutory presumption under s 37(d) of the Act, is that it would result in 'trafficking' being established conclusively upon proof by direct evidence of the single act of 'carrying' or 'transporting' a large quantity of drugs. This would arise as explained earlier, because upon proof by an eye witness account, for example, that a person was seen or found 'carrying' a quantity of drugs, it would be concluded, as in this case at the prima facie stage, that the person had physical custody and control of the said drugs. This would be followed by the application of the statutory presumption under s 37(d) to establish 'possession' and the consequent use of the quantity or weight of the subject drugs to prove 'trafficking' in those drugs. In short, 'trafficking' would be established by the use of a statutory presumption and the 'inference' referred to in Lord Diplock's passage in *Ong Ah Chuan v Public Prosecutor*. This is not the test or formula to be gleaned from the judgments of the superior appellate courts as set out above. Such an approach would, in effect, amount to the use of two 'presumptions' or a presumption' and an 'inference' to establish the element of 'trafficking' which runs contrary, in principle, to the rule settled in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 and further confirmed in *Tunde Apatira v Public Prosecutor* [2001] 1 MLJ 259 as well as *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713.

Was 'trafficking' established in the instant case?

[82] To turn to the facts of the instant case, the sole fact established by the eye-witnesses was that the accused was carrying a plastic bag, exh P9 which was subsequently found to contain cannabis, weighing 1,749g. There was no account of the accused having taken out the subject bag containing the drugs from his car. There was also no evidence on record of the accused making a 'delivery' of the subject drugs to SP2. The fact that SP2 is a drug user, cannot in itself allow this court to infer that he was supplying or providing or delivering cannabis to SP2. A perusal of the record of evidence will effectively show that the sole fact that was conclusively proven was that the accused was carrying the subject plastic bag, identified by SP4 to be exh P9. Accordingly there is no factual matrix or further circumstances to warrant the court making a finding that the accused was 'trafficking' in the subject drugs. It was conclusively proven that the accused had 'possession' of the subject drugs.

[83] Accordingly, at the close of the defence case, I find that the accused is guilty of having in his possession 1,749g of cannabis and not of 'trafficking' in that quantity of drugs. He accordingly stands convicted of the offence of the possession of 1,749g of cannabis under s 6 of the Act which is punishable under s 39A(2) of the Act.

Accused convicted as charged.

Reported by Andrew Christopher Simon